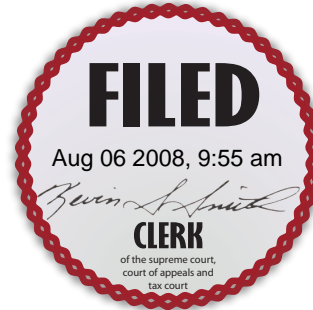


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JULIE D. HAYDEN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 29A04-0801-CR-36

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable J. Richard Campbell, Judge
Cause No. 29D04-0612-CM-7739

August 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Julie D. Hayden appeals her conviction for Prostitution, as a Class A misdemeanor.¹ We affirm.

Issue

Hayden raises three issues, which we consolidate and restate as whether the trial court's admission of evidence regarding Hayden's post-arrest silence as impeachment evidence violated her right to Due Process.

Facts and Procedural History

On December 6, 2005, Indianapolis Metropolitan Police Officer John Daggy, a supervisor of the vice unit, drove to Studio North Massage Parlor in Hamilton County to assist Hamilton County law enforcement with an investigation of local massage parlors for prostitution. When Officer Daggy entered the Studio North parlor and asked for a massage, he was introduced to Hayden, who would perform the massage. Officer Daggy paid Hayden sixty dollars, representing the price of the massage and a fifteen-dollar tip. Once in the massage room, Hayden instructed Officer Daggy to get undressed when she left the room. While Hayden was out of the room, Officer Daggy placed a couple of twenty-dollar bills in the room's tip jar, undressed, and positioned himself facedown on the table, covering his midsection with the towel provided. Upon her return, Officer Daggy asked Hayden if she would perform a sensual or topless massage. Hayden said yes, but that it would cost an additional twenty dollars. Officer Daggy paid Hayden. She then took off her top and began

¹ Ind. Code § 35-45-4-2(2).

the massage.

At some point, Hayden instructed Officer Daggy to turn over and continued the massage. Officer Daggy then asked Hayden to give him a “hand job.” Trial transcript at 29. Hayden inquired whether Officer Daggy was a police officer. He replied, “no,” and asked her the same question in return. After Hayden paused for a moment, she agreed to do so for forty dollars. Officer Daggy paid the money, and then Hayden began massaging his genitalia. Subsequently, Officer Daggy arrested Hayden for prostitution. Officer Daggy had Detective Mike Howell of the Hamilton County Sheriff’s Department transport Hayden to the jail. During the ride to the jail, Hayden conversed with Detective Howell but did not discuss her version of what took place in the massage room.

After a bench trial, Hayden was found guilty of prostitution, as a Class A misdemeanor. The trial court sentenced her to one hundred eighty days, which were all suspended except for two days that had already been served. Additional facts will be provided as necessary.

Hayden now appeals.

Discussion and Decision

At trial, Hayden testified that the interaction in the massage room was contrary to Officer Daggy’s testimony. She said that Officer Daggy had forced her to touch his penis and threatened her with more charges if she told anyone about what happened. On cross-examination, the State questioned Hayden as to her lack of reaction or silence in response to

Officer Daggy's alleged threats during the incident as well as to her failure to come forward with her account of the events prior to trial. Although Hayden's counsel did not object to this line of questioning, Hayden asks this Court to conclude that the trial court abused its discretion in admitting evidence regarding her post-arrest silence. Specifically, she contends these questions violate Article I, Section 14² of the Indiana Constitution because they impinge on her right to remain silent. Hayden asks this Court to conclude that the Indiana Constitution provides greater protection than its federal counterpart as to the prohibition of the use of a defendant's post-arrest silence for impeachment purposes.

"The failure to make a contemporaneous objection to the admission of evidence at trial, so as to provide the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced, results in waiver of the error on appeal." Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003). Hayden did not object to the cross-examination questions now challenged nor does she couch her argument on appeal in terms of fundamental error. Waiver notwithstanding,³ we conclude that the use of Hayden's post-arrest silence for impeachment purposes was not a constitutional violation.

Hayden acknowledges that based on a line of U.S. Supreme Court cases a State may offer evidence of the defendant's silence prior to or after his arrest for impeachment purposes

² No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself.

³ Hayden also claims that this evidence should have been excluded based on a balancing of probative value of the evidence and its prejudicial effect under Indiana Evidence Rule 403. However, we view this argument a rephrased version of her constitutional argument as Hayden would have to demonstrate that the admission of the evidence resulted in a denial of fundamental due process. See Glotzbach v. State, 783 N.E.2d 1221, 1226

when the defendant chooses to testify. Appellant’s Brief at 8. This is in contrast to what is commonly known as a Doyle violation. See Doyle v. Ohio, 426 U.S. 610 (1976). In Doyle, the U.S. Supreme Court held that the use for impeachment purposes of a defendant’s silence, at the time of the arrest and after receiving Miranda warnings, violates the Due Process Clause of the Fourteenth Amendment. Id. at 619. The rationale of this decision was premised on the Miranda warnings providing an implicit assurance to an individual in police custody that silence will carry no penalty. Id. at 618. Use of a defendant’s post-arrest, post-Miranda silence to impeach an explanation subsequently offered at trial would be contrary to this implicit assurance. Id.

The U.S. Supreme Court distinguished Doyle when it addressed the facts in Fletcher v. Weir, 455 U.S. 603 (1982). Fletcher involved the use of post-arrest silence of the defendant by the state to impeach the defendant’s theory of self-defense that was belatedly advanced at trial. Id. at 603-04. In distinguishing Doyle, the Supreme Court reasoned that the “significant difference between the present case and Doyle is that the record does not indicate that [the defendant] received any Miranda warnings during the period in which he remained silent immediately after his arrest.” Id. at 605. Relying on this difference, the Court held that, absent the implicit assurance embodied in Miranda warnings, impeachment by prior silence is permissible. Id. at 606-07.

As the record contains no evidence that Hayden received the Miranda warnings, Hayden concedes that the challenged line of questioning does not violate her federal

constitutional rights according to Fletcher. Instead, Hayden asserts that the right to remain silent as provided by the Indiana Constitution provides more protection than its federal counterpart and should prohibit such post-arrest silence for impeachment purposes. Hayden's argument misses the mark as Doyle and Fletcher are based on the Due Process Clause of the Fourteenth Amendment and her argument for expanded state constitutional protection is based on the premise that these cases are based on the Fifth Amendment right to remain silent. Therefore, we are not persuaded that the provisions of the Indiana Constitution should prohibit the use of a defendant's post-arrest silence for impeachment purposes where there is no record of Miranda warnings and the defendant testifies at trial in his own defense.

Affirmed.

RILEY, J., and BRADFORD, J., concur.